being used as a means of travel or transportation by water, or their cargoes,[8] and there appears to be no decided case in which a maritime lien for repairs has been enforced against an object of any other description. It is a very nice question whether a hydro-aeroplane may not fall within this rule, but there is nothing to indicate that the machine in the principal case was anything other than an ordinary aeroplane.

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THE PROPER SCOPE OF THE DOCTRINE OF EQUITABLE SERVITUDES. — Since the time when Lord Cottenham created an equitable appendix to the law of servitudes,[1] the question as to the nature of these rights and the limits within which they should be enforced has been a vexing one. This extension of the law resulted from the narrow legal rules governing covenants running with the land and easements. In order that the burden may run with the land at law, in England the covenant must be between a lessor and lessee or their assignees,[2] to fulfill the requirement that there be privity of estate between the covenanting parties.[3] In some of the United States covenants have also been allowed to run when the covenantee's owning an easement in the covenantor's land constitutes the only privity of estate.[4] The law of easements was also strict. Not only was appurtenancy to a dominant tenement required,[5] except in a few states,[6] but also, from the principle that easements must not create rights of an unusual or capricious character,[7] the kinds of easements became limited, and with a few exceptions were not recognized in the case of negative restrictions on the servient tenement.[8]

The cases in which equity first enforced restrictive agreements did not purport to add to the law of easements and covenants, but based their relief on the principle that it was inequitable, because of unjust enrichment, for a person who had notice to take property free from a restrictive contract which the owner had made concerning its use.[9]

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[8] The Big Jim, 61 Fed. 503. See authorities cited in The Starbuck, 61 Fed. 502, and AMES, CASES ON ADMIRALTY, 75, n. Flotsam, jetsam, and ligan must of course be embraced in the term "cargo" to render the above statement accurate.

[1] Tulk *v.* Moxhay, 2 Ph. 774.

[2] STAT. 32 HEN. VIII., c. 34, enlarged the common-law rules which had allowed only the assignee of the lessee to sue and be sued.

[3] Keppell *v.* Bailey, 2 My. & K. 517; Austerberry *v.* Corporation of Oldham, 29 Ch. Div. 750, 781.

[4] Morse *v.* Aldrich, 36 Mass. 449.

[5] Rangeley *v.* Midland Ry., L. R. 3 Ch. 310; see also Ackroyd *v.* Smith, 10 C. B. 164.

[6] Goodrich *v.* Burbank, 94 Mass. 459.

[7] Per Lord Brougham, Keppell *v.* Bailey, *supra*, at 534; Hill *v.* Tupper, 2 H. & C. 121. See GALE, EASEMENTS, 8 ed., ch. 3, for a compilation of the various kinds of easements allowed at law in England.

[8] GALE, EASEMENTS, p. 24, names only three negative easements which are recognized in England, *i. e.*, easements for light and air, for support of neighboring soil, and to receive the flow of water in an artificial stream.

[9] Tulk *v.* Moxhay, *supra*; Haywood *v.* Brunswick Permanent Benefit Building Society, 8 Q. B. D. 403. In Hall *v.* Ewin, 37 Ch. Div. 74, 79, Colton, L. J., said "If a man buys land subject to a restrictive covenant, he regulates the price accordingly," and concludes that it would be unfair to let him now have the land unrestricted. Dean Ames supported this view. AMES, LECTURES ON LEGAL HISTORY, p. 385.

This was really arguing in a circle, for the vendor would sell at less than the full price only if the law were that the vendee did not take free of restrictions. Furthermore, there are no cases refusing to bind the vendee because he in fact made no profit. This vague explanation, therefore, gave no limits to the extent of the doctrine. The first hint of a more definite standard came when Sir George Jessel perceived that *Tulk* v. *Moxhay*[10] was really an extension in equity either of covenants running with the land or of negative easements.[11] The latter analogy seemed triumphant when dominant and servient tenements in regard to which the restriction might apply, were held necessary.[12]

If equitable servitudes are, then, an addition to the law of easements, what must be the nature of the dominant estate to which they attach? At law one incorporeal estate might be appurtenant to another.[13] There is authority to the effect that an easement can be appurtenant to a profit,[14] or to another easement.[15] In equity the necessity of a dominant tenement is at least as easily complied with as it is at law. The courts have allowed equitable servitudes to attach to one chattel for the benefit of another chattel,[16] and have even allowed a servitude to attach to one business in favor of another business.[17]

In a recent case the English Court of Appeal seems to have taken a stricter view as to the characteristics necessary to constitute a dominant tenement. *London County Council* v. *Allen*, [1914] 3 K. B. 642.[18] A landowner agreed with the London County Council not to build on property which the Council wished to use later for street purposes, at the end of a street they were then opening. It was admitted that under the English law the covenant would not run at law,[19] and the court denied that it attached in equity, on the ground that there was no dominant tenement. The possibility that the public right in the streets might be a sufficient dominant estate was not considered, although this right is usually termed an easement;[20] and even authority which doubts this terminology does not suggest that the interest of the public is not

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[10] *Supra*, n. 1.

[11] London, etc. Ry. Co. *v.* Gomm, 20 Ch. Div. 562, 583.

[12] Formby *v.* Barker, [1903] 2 Ch. 539; see Peck *v.* Conway, 119 Mass. 546; Webb *v.* Rollins, 77 Ala. 176, 183.

[13] Co. Litt., 121 *b*, n. 7 (H. & B.'s ed.). "A thing incorporeal can be appurtenant to another thing incorporeal, the test being whether they are capable of union without incongruity."

[14] See Hanbury *v.* Jenkins, [1901] 2 Ch. 401, 422.

[15] Gale, Easements, 8 ed., p. 12; see Lord Alverstone's test in Attorney-General *v.* Copeland, [1901] 2 K. B. 101.

[16] Murphy *v.* Christian Press Association, 38 N. Y. App. Div. 426, 56 N. Y. Supp. 597; Henry *v.* Dick Co., 224 U. S. 1.

[17] Francisco *v.* Smith, 143 N. Y. 488, 38 N. E. 980; Fleckenstein *v.* Fleckenstein, 66 N. J. Eq. 252, 57 Atl. 1020; Catt *v.* Tourle, L. R. 4 Ch. 654; Luker *v.* Dennis, 7 Ch. Div. 227.

[18] For a more complete statement of the facts of this case, see this issue of the Review, p. 213.

[19] This admission would not be necessary in those American states allowing a covenant in aid of an easement to run at law. See n. 4, *supra*.

[20] Dovaston *v.* Payne, 2 H. Bl. 527; St. Mary, Newington *v.* Jacobs, L. R. 7 Q. B. 47, 54; see 1 Elliott, Roads and Streets, § 255.

a true property right.[21] It is therefore submitted that this restriction attached to the benefit of the public user in the streets, and that the London County Council in charge of such public interests was the proper body to enforce it.[22]

The court failed to recognize this, and Scrutton, J., regretting the result to which he felt himself forced, suggests that the present rule is over narrow, and that it would be of advantage to go back to the old doctrine of unjust enrichment, which is, as we have seen, no test at all. This result is unnecessary if the courts are sufficiently liberal in their test of a dominant estate. In this way a more workable standard is obtained and one by which equity may properly carry out Lord Cottenham's attempt to add to the narrow limits of easements at law.

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# RECENT CASES

ADMIRALTY — JURISDICTION — AEROPLANE FALLEN IN NAVIGABLE WATERS. — An aeroplane fell in navigable waters of Puget Sound. A libel was brought in admiralty to enforce a lien for repairs. *Held*, that the court had no jurisdiction. *The Crawford Bros., No. 2*, 215 Fed. 269. (Dist. Ct., W. D. Wash.)

For a comment on this extraordinary attempt at the extension of admiralty jurisdiction, see NOTES, p. 200.

BANKRUPCTY — PREFERENCES — INTENT OF DEBTOR: IMPORTANCE OF MOTIVE. — A debtor sent his creditor a check in the ordinary course of business. The creditor failed to cash the check and five days later learned of the debtor's insolvency. Not having the original check with him, the creditor then obtained from the debtor a duplicate check, which he cashed. Both parties at this time had full knowledge of the insolvency. *Held*, that this transaction is not a voidable preference under the Irish Bankruptcy Act. *In re Oliver*, [1914] 2 Ir. K. B. 356 (C. A.).

The narrow construction given the words "with a view of giving a preference" in the English bankruptcy law has confined the English law in regard to preferences within narrow limits. For a transfer made by a debtor with knowledge that it will prefer a creditor is not deemed a preference unless that was the debtor's dominant motive. *In re Eaton*, [1897] 2 Q. B. 16. Accordingly, if the debtor's motive is to perform a supposed legal duty, or if the payment is made because of pressure from a creditor, the transfer is not regarded as pref-

[21] GALE, EASEMENTS, p. 15, doubts whether the right of user of the people in a street is an easement because there is no dominant tenement.

[22] Coverdale *v.* Charlton, 4 Q. B. D. 104, shows the ordinary operation of this rule. The court denies that the Council in the principal case has any estate or interest in the land (p. 653), citing §§ 7 and 9 of the London Building Act, 1894; but the statute referred to says nothing on that question, merely detailing the method by which the Council might accept the dedication of new streets to the public's use. STAT. 51–52 VICT., ch. 41, pt. 2, § 4, gives certain powers to the County Council, to the sewer inspector, and to the borough councils as to the repair and management of the London streets. It is not entirely clear from these acts by which body the property interest of the people is held, but it would seem from a reading of the provisions that the County Council was in control. Even if the County Council were vested with only part of this interest, it would seem that the court should have recognized this part interest as sufficient to give the Council power to act.